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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

——— Term, 1953

No. 537

L. S. "BOB" CORNETT,
Petitioner,

vs.

THE STATE OF NEBRASKA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA
AND
SUPPORTING BRIEF OF PETITIONER
AND
ENTRY OF APPEARANCE AS COUNSEL

EUGENE D. O'SULLIVAN,
One of the Attorneys for the Petitioner.

Law Briefs — OMAHA LINO-SLUG PRINTING CO. — 413 So. 15th St.

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PETITION FOR WRIT OF CERTIORARI

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May It Please the Court:

The Petitioner, L. S. "Bob" Cornett, respectfully petitions this Honorable Court for a Writ of Certiorari to the Supreme Court of Nebraska.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case involves the sentence and conviction of the Petitioner on a direct Information filed initially in the District Court of Douglas County, Nebraska, charging him in the vague and indefinite way of not being licensed or authorized to practice law in the State of Nebraska,

which specified conduct constituted the practice of law in the State of Nebraska and was illegal "and is a hindrance to the administration of justice in proceedings had or proceedings pending before the courts of this state; and that by reason of the foregoing the said defendant, L. S. "Bob" Cornett, is in contempt of Court." (Tr. pp. 12 to 16, incl.)

On this Information an order to show cause was signed by the presiding District Judge of Douglas County, Nebraska, and served upon your Petitioner (Tr. p. 17).

To the Information your Petitioner filed a Motion to Quash, which attacked same on several grounds among them being, that the Court was without jurisdiction in this matter, that the matters complained about did not amount to the practice of law as constituted by Nebraska law or the existing District Court Rules that the Information was verbose and "chatty" and set forth conclusions of law and fact instead of factual matters and other matters (Tr. pp. 18, 19), which was overruled by the Court (Tr. p. 20) as was a Demurrer (Tr. pp. 22, 21).

That the Petitioner requested the trial Judge to disqualify himself because of his evidentiary activities in the matter before the filing of the Information.

The Petitioner filed an answer which reiterated the matters set forth in the previous pleadings (Tr. pp. 21, 22).

That a trial was had upon the information and the trial Judge found your Petitioner guilty as charged, and

sentenced him to imprisonment in the County Jail of Douglas County, Nebraska, for a period of 60 days and to pay a fine of $1,000.00 and the costs of the case (Tr. pp. 27, 28).

Thereafter a Motion for a New Trial was filed, which was overruled by the Court (Tr. pp. 29 to 34, incl.).

By appropriate and legally proper proceedings the case was lodged then in the Supreme Court of Nebraska, by a Petition in Error (Tr. pp. 3 to 10, incl.) and on April 9th, 1952, was submitted to the Supreme Court on briefs and argument (Tr. p. 35) and on June 6th, 1952, was affirmed by the Supreme Court (Tr. p. 36), which opinion of the Court is to be found at pages 37 to 49 of the Transcript tendered herewith.

That on June 26th, 1952, within the time provided by law a Motion for a Rehearing and supporting brief was filed by your Petitioner (Tr. pp. 50, 51), which Motion was overruled by the Court (Tr. p. 54) on October 10th, 1952.

That thereafter pursuant to your Petitioner's request (Tr. p. 53), the mandate in the case was stayed "until January 10th, 1952, or until this cause shall have been remanded by the United States Supreme Court" (Tr. p. 55).

THIS COURT HAS JURISDICTION

The Federal Constitutional issues are properly preserved and are grounded upon that part of the Fourteenth Amendment which provides, "Nor shall any state deprive any person of life, liberty, or property without

due process of law" (Tr. pp. 32, 33, paragraphs 30 and 31 and Tr. pp. 8, 9, paragraphs 30 and 31) and this matter is presentable to this Court properly under Section 1257(3) of the United States Code Annotated.

THE QUESTIONS PRESENTED

1. Can a District Court under Nebraska law, by a direct Information, take cognizance of an alleged contempt of Court concerning a case not then legally pending before the Court at and prior to the alleged filing?

2. Is an Information for contempt of Court, which fails to allege that the acts pleaded were done wilfully, knowingly, contumaciously, unlawfully and intentionally, or the use of words of similar or like import sufficient legally?

3. Is an Information sufficient legally which fails to allege specifically that the acts complained of were in contempt of the particular Court before which the Information was lodged, but on the contrary alleges that one has offended against the "Courts of this State," which meant every Municipal, County and District Court of the State of Nebraska as well as the Supreme Court of the State?

4. Did the trial Court have jurisdiction to entertain, hear and determine this case?

5 Did the trial Judge err in refusing, upon request of counsel for Petitioner, to disqualify himself?

6. Can it be stated correctly, legally, that one has been accorded "due process of law," under Section 1 of Article 14, of the Amendments to the United States

Constitution, when he has been tried and convicted before a Court which had no jurisdiction over the matter, by a trial Judge not qualified to hear and determine the matter because of his evidence gathering activities upon an Information which is illegal, null and void?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A substantial Federal question presents itself with respect to the right of the Judiciary of a State to proceed against, try, convict and sentence to fine and imprisonment a person for an alleged contempt of Court in reference to a matter not before the Court legally, on a legally insufficient complaint, when the Court before whom the matter has been commenced occupies the dual role of evidence gathered and Judge when the canons of legal ethics prohibits a Judge to act in any such dual role, and demands a fair arbiter of the law and the facts and not a composite of arbiter, evidence gatherer and prosecutor.

If the Judges of any entity of Government seek to do more in the hearing and determination of a case than their plain judicial duties then our boasted Justice becomes a mockery and a fraud. Everytime anyone, no matter how base and ignoble, is denied his rights under the Constitution and the laws, honest men lose their rights also, for the law is made when the base and ignoble are tried, which, in time, may plague all honest men if the decisions of the Courts are not in true harmony with statutory, applicable common law, moral law, and Constitutional law. When the Courts of a land fail to do their duty fearlessly without even the suspicion of

interest, bias and prejudice human justice perishes in that land.

Due process of law contemplates a valid complaint, a Court having jurisdiction to hear and determine the cause, and a fair and disinterested trial Court, which is in an attitude of mind to deal out even-handed justice to an accused and give him the benefit of every reasonable doubt not only as far as the facts are concerned but as to the law as well.

A Court trial is never a game, but a search for the legal and factual truths and a proper administration of Justice in keeping with the law of the land.

The record in this case discloses no such legal picture.

Respectfully submitted,

EUGENE D. O'SULLIVAN,
One of the Attorneys for Petitioner.

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BRIEF IN SUPPORT OF QUESTIONS PRESENTED

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Statement of Questions Presented

We have heretofore set forth rather succinctly, we believe, the questions relied upon and feel that it would serve no useful purpose to repeat them again.

Reasons for Granting Petition for Writ to State Court

As heretofore stated in the previous heading we have clearly stated our reasons and shall not burden the Court by reiterating them here.

Clause as to Transcript of Record

Your Petitioner presents to this Court and files herewith as Exhibits hereto, a duly certified Transcript of the pleadings in the case as made up by the Clerk of the Supreme Court of Nebraska and a Stipulated Abstract of the Evidence.

PARTICULAR QUESTIONS ARGUED IN THE PETITION FOR CERTIORARI

I.

Can a District Court under Nebraska law by a direct Information, take cognizance of an alleged contempt of Court concerning a case not then legally pending before the Court at and prior to the alleged filing?

The action filed in the District Court against Dwight Miller, Jr., was for Grand Larceny attempted to be disposed of by a new pleading called a Direct Information in the District Court without a complaint in the Police Court or a preliminary hearing or the filing of an authenticated transcript of the lower Court proceeding in the District Court.

The practice has grown up in this jurisdiction to handle felony cases in this matter not by virtue of any statutory enactment but on the theory that the defendant may waive legally a preliminary complaint and hearing.

Our Statute clearly states in Sec. 29-1607 that "No Information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor as provided by law, before a justice of the peace or other examining magistrate or officer un-

less such person shall waive his right to such examination.''

In this case no preliminary hearing or waiver of same was had. No transcript was filed in the District Court so showing. A direct Information alone was filed.

The District Court of Douglas County, Nebraska, had no legal jurisdiction of this Dwight Miller, Jr., Information until he pleaded guilty to same in the District Court.

When the County Attorney filed the Dwight Miller, Jr., Information on August 30, 1951, the District Court acquired no jurisdiction because up to that time no Complaint had been filed against him and he had not had or waived a preliminary hearing on that Complaint. No Transcript of the proceedings in the lower Court had been filed, because there was none. He refused to plead guilty on August 30th, 1951, when he was brought before the District Court and wanted to get out on bond. At that time the presence of that Information in the District Court was without warrant or authority in law, all of the matters complained of in the Information occurred after that, to-wit,—August 31, 1951, and September 1, 1951, and prior to entering of any plea of guilty in the case. If that be true then the District Court never had any jurisdiction of the Miller, Jr., case because when all of the acts complained of were done the District Court had not yet acquired jurisdiction of the matter. The language of the Nebraska Court in its opinion that ''There can be no doubt that a proceeding for a constructive contempt must be instituted in the Court towards which the contempt is directed'' becomes authority for this Petitioner. At that time the Criminal Division of the Omaha Municipal Court

had jurisdiction of the defendant, Miller, Jr., because he, Miller, Jr., had not pleaded guilty as yet in the District Court of Douglas County, Nebraska, and he was answerable for this grand larceny charge in the Criminal Division of the Omaha Municipal Court until he consented to plead guilty in the District Court on this "shortcut" Information.

II.

Is an Information for Contempt of Court, which fails to allege that the acts pleaded were done wilfully, knowingly, contumaciously, unlawfully, and intentionally, or fails to use words of like or similar import, sufficient legally?

The Information for contempt of Court is to be found in the certified Transcript at pages 12 to 17, inclusive.

It fails to allege anywhere that the acts complained about were done by Cornett "willfully, knowingly, contumaciously, unlawfully and intentional" as is done in all such complaints and as was done in the case of *State ex rel Hinkle, et al.,* 137 Neb. 375, 291 N. W. 268; *McFry vs. City of Lincoln,* 127 Neb. 404, 255 N. W. 239; *Whippee vs. Nelson,* 132 Neb. 514, 93 N. W. 382; *Nicklaus vs. Halloway,* 144 Neb. 503, 13 N. W. (2d) 655.

The Court, although these cases were cited in our Brief, made no reference to them or treated this particular point in its entirety as made in our Brief.

In the three last cases cited above it was held that the acts must have been charged to have been done "wilfully," and although this matter is considered in the opinion adverse to the appellant yet no mention is made of the fact that these three prior cases decided by our

Supreme Court have held that the Information must *charge* that the acts complained of were done "wilfully," although the opinion in the instant case says: *"The word 'wilful' is not used, but the recitals of the information show clearly that it was wilful."* We are unable to see or agree that the Information makes any such disclosure. When the decided cases hold that "wilful" must be alleged how can the Court presume same from the other language of the Information? Certainly conjecture should not be allowed to take the place of necessary allegations.

The Information alleged not that the appellant was in contempt of the District Court of Douglas County, Nebraska, in precise and certain language but that appellant had offended against "the Courts of this State" which meant every Municipal Court, every County Court, every District Court in the State of Nebraska and the State Supreme Court, and also the United States Courts.

True the Information was very specific about what was said and done between the parties but as "silent as the grave" on all the matters actually necessary to make it a legal Information.

All of the aforementioned deficiencies were called to the attention of the trial Court in the Motion to Quash and the Demurrer but the trial Court overruled both of same. These matters were urged and in some instances argued at appropriate times during the trial as the record discloses but the trial Court was adamant.

III.

Is an Information sufficient legally which fails to allege specifically that the acts complained of were in

contempt of the particular Court before which the Information was lodged, but on the contrary alleges that one has offended against the "Courts of this State," which meant every Municipal, County and District Court of the State of Nebraska, as well as the Supreme Court?

There never was a legally sufficient Information before the Court.

The Information charged One and not Two Counts and that One Count was charged to be the unauthorized practice of law *"in the State of Nebraska and is illegal and was in hindrance to the due administration of justice in proceedings had or proceedings pending before the Courts of this State."*

A fair reading of the foregoing matter in italics we think will disclose that the matter referred to as "illegal" was the unauthorized practice of law and the matter referred to as a "hindrance to the due administration of justice, etc.," was also the unauthorized practice of law. It was not another Count charging contemptuous conduct towards the Court in a way other than the unauthorized practice of law as the opinion of the Court holds. If such was the case then we would find the word "also" before the words "is illegal" and the word "also" between the words "and (also) was and is a hindrance to the due administration of justice, etc."

Another matter which the Court fails to consider in the opinion is that this action in the District Court against Dwight Miller, Jr., was for Grand Larceny attempted to be disposed of by a new pleading called a Direct Information in the District Court without a complaint in the

Police Court or a preliminary hearing or the filing of an authenticated transcript of the lower Court proceedings in the District Court.

The practice has grown up in this jurisdiction to handle felony cases in this matter not by irtue of any statutory enactment but on the theory that the defendant may waive legally a preliminary complaint and hearing.

Our Statute clearly states in Sec. 29-1607 that "No Information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor as provided by law, before a justice of the peace or other examining magistrate or officer unless such person shall waive his right to such examination."

In this case no preliminary hearing or waiver of same was had. No transcript was filed in the District Court so showing. A direct Information alone was filed.

The District Court of Douglas County, Nebraska, handle felony cases in this matter not by virtue of any had no legal jurisdiction of this Dwight Miller, Jr., on this Information until he pleaded guilty to same in the District Court.

When the County Attorney filed the Dwight Miller, Jr., Information on August 30, 1951, the District Court acquired no jurisdiction because up to that time no Complaint had been filed against him and he had not had or waived a preliminary hearing on that Complaint. No Transcript of the proceedings in the lower Court had been filed, because there was none. He refused to plead guilty on August 30th, 1951, when he was brought before

the District Court and wanted to get out on bond. At that time the presence of that Information in the District Court was without warrant or authority in law, all of the matters complained of in the Information occurred after that, to-wit,—August 31, 1951, and September 1, 1951, and prior to entering of any plea of guilty in the case. If that be true then the District Court never had any jurisdiction of the Miller, Jr., case because when all of the acts complained of were done the District Court had not yet acquired jurisdiction of the matter. The language of this Court in the opinion that "There can be no doubt that a proceeding for a constructive contempt must be instituted in the Court towards which the contempt is directed" becomes authority for this appellant. At that time the Criminal Division of the Omaha Municipal Court had jurisdiction of the defendant, Miller, Jr., because he, Miller, Jr., had not pleaded guilty as yet in the District Court of Douglas County, Nebraska, and he was answerable for this grand larceny charge in the Criminal Division of the Omaha Municipal Court until he consented to plead guilty in the District Court on this "short-cut" Information.

We have very serious doubts about the legality of this Direct (short-cut) Information proceedings.

IV.

Did the trial Court have jurisdiction to entertain, hear and determine this case?

The contempt of Court Information was grounded upon the alleged doing of certain claimed things by the Petitioner in reference to a grand larceny charge against one Dwight Miller, Jr., who was arrested in Council

Bluffs, Iowa, and lodged thereafter in the Omaha Central Police Station. No preliminary complaint was filed against Miller in the Police Court as contemplated by Nebraska law. A Direct Information is not specifically authorized by Nebraska law. Nevertheless after the doing of all of the acts complained of as against the Petitioner, a plea was entered in the District Court on a Direct Information. It is doubtful if the Court ever acquired jurisdiction of Miller's criminal charge of Grand Larceny, but if the Court did then it acquired jurisdiction only when Miller pleaded guilty to same and that was after the commission of all of the alleged contemptuous acts

Before any Court can acquire jurisdiction in a criminal case some complaint on oath must have been made before a judge of competent jurisdiction. *Morrow vs. State,* 140 Neb. 592, 300 N. W. 843. In this way, among other things, responsibility for false swearing and false charges could be fixed.

No such complaint under oath was ever made.

The Information charging Grand Larceny was not sworn to under oath by anyone having knowledge of the facts, but was sworn to on information and belief by the County Attorney. The Information for contempt of Court was also sworn to on information and belief by the County Attorney who had no first hand information as to the facts. What he knew was purely hearsay.

The Information for contempt of Court nowhere alleged the necessary and proper charging words such as wilful, unlawful, contumacious, etc. In fact it was a mere recital and not a correct charge.

The Information for contempt of Court utterly failed to allege that the Court before which the Information for contempt of Court was filed and tried had been offended against. It merely charged that the Courts of the State had been offended against.

Under Nebraska law, since the adoption of the Integrated Bar the only Court which has jurisdiction to try an unauthorized practice of law case is the Supreme Court and not the District Court.

We are at a loss to understand how it can be claimed that the District Court of Douglas County, Nebraska, could claim that same had any jurisdiction whatsoever over this legal controversy.

V.

Did the trial Judge err in refusing, upon the request of counsel for the Petitioner, to disqualify himself?

At the very beginning of the trial of this case, and before anything had been presented to Judge English one of the counsel for Mr. Cornett asked the Judge to disqualify himself, which he refused to do.

Judge English claimed that the alleged contemptuous conduct of Mr. Cornett was directed against the District Court of Douglas County, Nebraska, and himself. Judge English quizzed Mrs. Dwight Miller, Sr., in his office (B. of E., pp. 124, 125) although she at first denied same until Judge English furnished her the date of their meeting (124:655,656) on September 7th, 1951. She also testified that Mrs. Dwight Miller, Jr., was with her.

She was contacted and brought to Judge English's office by Adult Probation Officer Stevenson (126:678-681, incl.).

In view of the fact that Judge English believed that this alleged contemptuous matter was directed against the District Court and himself he spearheaded the investigation leading to this Contempt of Court proceedings. He should not have heard and decided this case, but should have transferred the case to some other District Judge for trial and determination, unless the appellant gave his consent for him to try the case.

In the case of *Cooke vs. United States,* 69 L. Ed. 767, 45 S. C. 390, 267 U. S. 517, 539, it is stated that if the contempt involves disrespect or criticism of a Judge that Judge is disqualified from presiding at the trial or hearing, except with the consent of the accused.

This same rule of law is asserted in Rule 42 of the Federal Rules of Procedure and we think it is a correct legal view of the matter.

We quote the following from Rule 29 of the Canons of Judicial Ethics adopted by the Nebraska State Bar Association:

> "A Judge should abstain from performing or taking part in any judicial act in which his personal interests are involved."

VI.

Can it be stated correctly, legally, that one has been accorded "due process of law" under Section 1 of Article 14 of the Amendments to the United States Constitution, when he has been tried and convicted before

a Court which had no jurisdiction over the matter, by a trial Judge not qualified to hear and determine the matter, because of his evidence gathering activities, upon an Information which is illegal, null and void?

It seems to us to be palpably plain that the only answer which one could give reasonably would be that such is not due process of law, but on the contrary is the very essence of unwitting lawlessness.

CONCLUSION

Your Petitioner submits to the Court, respectfully, that a Writ of Certiorari should issue out of the Supreme Court of the United States to the Supreme Court of Nebraska, taking jurisdiction of this case.

EUGENE D. O'SULLIVAN,
One of the Attorneys for Petitioner.

The Clerk will please enter my appearance in the above entitled case as one of the Attorneys for the Petitioner herein.

EUGENE D. O'SULLIVAN,
278 Aquila Court Building,
Omaha 2, Nebraska.

Encl